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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. 399

MRS. GEORGE C. WRIGHT and VIRGIL M. GUTHRIE,
Petitioners,

v.

WILLIAM P. MITCHELL,
Respondent.

PETITION FOR WRIT OF CERTIORARI
and
SUPPORTING BRIEF.

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Cases Cited.

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v.

WILLIAM P. MITCHELL,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

The petition of Mrs. George C. Wright and Virgil M. Guthrie respectfully shows to this Honorable Court:

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

For convenience we shall refer to respondent as plaintiff and to petitioners as defendants, their positions in the District Court.

Plaintiff, a Negro, sued on behalf of himself and of the members of the following class, "namely, Negro citizens of the United States and residents and citizens of the State of Alabama and Macon County, Alabama, who possess all of the qualifications to be registered as voters and they possess none of the disqualifications of voters"

(R. 3). Though the point was raised by grounds 42 (R. 19) and 48 (R. 20) of the motion to dismiss, there was never any averment that any members of the class in whose behalf the plaintiff sued, other than the plaintiff himself, had made application to register or had been denied registration.

The defendants were sued as individuals, but the complaint alleged that they were administrative officers of the State of Alabama, namely, registrars of Macon County, Alabama, whose duty it was "to register all applicants qualified for registration as electors" (R. 4, 5).

By way of conclusion unsupported by any averments of fact, the plaintiff alleged (R. 5):

> "That defendants have established and are maintaining a policy custom and usage of denying to plaintiff and others on whose behalf this suit is brought the equal protection of the laws by requiring them to submit to tests not required of white electors applying for registration and have continued the policy of refusing to register qualified Negro electors while at the same time registering white electors with less qualifications than those of Negro applicants solely because of race or color."

The plaintiff further averred that he was entitled to be registered as a voter but that the defendants wrongfully and illegally refused to register plaintiff "solely on account of his race, color, and previous condition of servitude" (R. 6).

The complaint prayed for the following relief (R. 8):

> "1. That this Court adjudge and decree, and declare the rights and legal relations of the parties to the subject matter herein controverted, in order that such declaration shall have the force and effect of a final judgment or decree.
>
> "2. That this Court enter a judgment or decree declaring that the policy, custom or usage of the de-

fendants, and each of them, in refusing to register as electors plaintiff and other qualified Negroes solely on account of their race, or color, is unconstitutional as a violation of Amendments 14 and 15 of the United States Constitution.

"3. That this Court enter a judgment or decree declaring that the policy, custom and usage of the defendants in subjecting Negroes to tests not required of white applicants as a prerequisite to registering is unlawful and in violation of the Fourteenth Amendment of the Constitution of the United States.

"4. That this Court issue a permanent injunction forever restraining and enjoining the defendants and each of them from subjecting Negroes to tests not required of white applicants as a prerequisite to register.

"5. That the plaintiff have judgment for Five Thousand ($5000.00) Dollars damages.

"6. That this Court will allow plaintiff his costs herein and such further, other, additional or alternative relief as may appear to the Court to be just and equitable in the premises."

The defendants moved to dismiss the complaint and assigned sixty-one grounds for such motion (R. 9-20). The motion by grounds 41 to 49 (R. 18-20) inclusive questioned the right of the plaintiff to maintain this action as a class action for a declaratory judgment and for injunction. The motion by ground 39 (R. 18) and other more specific grounds questioned also whether the complaint stated a claim upon which relief can be granted to the plaintiff individually.

The District Judge wrote an opinion (R. 25-35) in which he held that the plaintiff could not maintain this action as a class action for a declaratory judgment or for injunction nor as an action for damages to himself and accordingly dismissed the complaint (R. 35).

The Circuit Court of Appeals reversed the judgment of

the District Court and remanded the cause for further proceedings not inconsistent with its opinion, but refused to decide whether the plaintiff may maintain this action for the recovery of damages only or also:

(a) As a class action.
(b) As an action for a declaratory judgment.
(c) As a suit for injunction.

JURISDICTIONAL STATEMENT.

Jurisdiction of the District Court was invoked under subdivisions 11 and 14 of Section 41, Title 28, of the United States Code, this purporting to be an action to redress the deprivation of rights, privileges and immunities secured by the Constitution of the United States, viz., Sections 2 and 4 of Article 1 and Amendments 14, 15 and 17 to the Constitution, and of rights secured by laws of the United States, viz., Sections 31 and 43 of Title 8 of the United States Code, all of which are copied in the Appendix to this brief. The action was sought to be maintained also as a proceeding for a declaratory judgment under Section 400 of Title 28 of the United States Code [Section 274 (d) of the Judicial Code] and further as a class action authorized by Rule 23 (a) of the Rules of Civil Procedure for the District Courts of the United States.

Opinion and judgment of the Circuit Court of Appeals for the Fifth Circuit were rendered April 24, 1946, petition for rehearing denied May 20, 1946. Application is made to the Supreme Court of the United States for the allowance of a writ of certiorari within three months after the entry of the judgment or decree sought to be reviewed as permitted by Sections 240 and 262, Judicial Code (28 U. S. Code, Sections 350 and 377; See also Section 347).

THE QUESTIONS PRESENTED.

1. The Circuit Court of Appeals erred in failing or refusing to decide important questions presented by the record and specifications of error in briefs and on petition for rehearing as to whether the plaintiff may maintain this action:

(a) As a class action.
(b) As an action for a declaratory judgment.
(c) As a suit for injunction.

2. The Circuit Court of Appeals erred in holding that the complaint shows that the plaintiff has been deprived of any right, privilege, or immunity secured by Article 1, Sections 2 or 4, or by the Seventeenth Amendment of the Constitution of the United States.

3. The Circuit Court of Appeals erred in holding in effect that by adopting for Congressional elections the qualifications of voters for the most numerous branch of the State Legislature, and by leaving proof of such qualifications to be determined by the registration required by the State, the Federal Government had acquired jurisdiction to supervise the right to vote in the State.

4. The Circuit Court of Appeals erred in holding that the complaint shows that the plaintiff has been deprived of any right, privilege or immunity secured by either the Fourteenth Amendment or Fifteenth Amendment to the Constitution of the United States.

5. The Circuit Court of Appeals erred in holding in effect that the alleged action of the Registrars *contrary to the State law and for the correction of which the State had provided an adequate remedy by appeal without cost to the plaintiff* is action of the State itself forbidden by either the Fourteenth or Fifteenth Amendment to the Constitution of the United States.

6. The Circuit Court of Appeals erred in holding that the remedy of the plaintiff by appeal under the laws of Alabama is judicial and not administrative, or that the plaintiff need not exhaust such administrative remedy before resorting to the Federal Court.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the powers of supervision of the Supreme Court in that the Circuit Court of Appeals has failed and refused to decide important questions properly presented to it for decision. The Circuit Court of Appeals failed and refused to decide whether the plaintiff may maintain this action:

(a) As a class action.
(b) As an action for a declaratory judgment.
(c) As a suit for injunction.

Such a failure or refusal of the Circuit Court of Appeals to decide pertinent questions presented by the Appeal is contrary to the doctrine early announced by this Court that "Where the law gives a party an appeal, he has a right to demand the conscientious judgment of the appellate Court on every question arising in the cause."

Post v. Jones, 60 U. S. (19 How.) 150, 161, 15 L. ed. 618, 622.

2. The Circuit Court of Appeals has decided an important question of federal Constitutional law which has not been but should be settled by the Supreme Court of the United States, namely, whether the refusal of defendants, as Registrars of Macon County, Alabama, to register plain-

tiff as an elector, deprives the plaintiff of any right, privilege or immunity secured by Article 1, Sections 2 or 4, or by the Seventeenth Amendment to the Constitution of the United States.

3. The Circuit Court of Appeals has decided the question just referred to in a way probably in conflict with the following applicable decisions of the Supreme Court:

U. S. v. Classic, 313 U. S. 299, 315, 85 L. ed. 1368, 1376;
Ex p. Yarbrough, 110 U. S. 651, 28 L. ed. 274;
Wiley v. Sinkler, 179 U. S. 58, 66, 45 L. ed. 84, 89;
Screws v. U. S., 325 U. S. 91, 89 L. ed. 1495;
Pope v. Williams, 193 U. S. 621, 632, 48 L. ed. 817, 822;
Breedlove v. Suttles, 302 U. S. 277, 82 L. ed. 252.

4. The Circuit Court of Appeals has decided an important question of federal Constitutional law which has not been but should be settled by the Supreme Court, namely, that the alleged action of the Registrars contrary to the State law and for the correction of which the State had provided an adequate remedy by appeal without cost to the plaintiff is action of the State itself forbidden by either the Fourteenth or Fifteenth Amendment to the Constitution of the United States.

5. The Circuit Court of Appeals in holding that the remedy of the plaintiff by appeal under the laws of Alabama is judicial and not administrative or that the plaintiff need not exhaust such administrative remedy before resorting to the Federal Court decided a federal question in a way probably in conflict with the following applicable decisions of the Supreme Court:

Lane v. Wilson, 307 U. S. 268, 59 S. Ct. 872, 83 L. ed. 1281;

Prentis v. A. C. L. R. Co., 211 U. S. 210, 226, 53 L. ed. 150, 159;

Henderson Water Co. v. Corporation Commission, 269 U. S. 278, 70 L. ed. 273;

Keller v. Potomac Elec. Power Co., 261 U. S. 428, 67 L. ed. 731;

Porter v. Investor's Syndicate, 286 U. S. 461, 76 L. ed. 1226;

Same case, 287 U. S. 346, 77 L. ed. 354;

Ex p. Virginia, 100 U. S. 339, 25 L. ed. 676, 680;

Pacific Telephone Co. v. Kuybendall, 265 U. S. 196, 68 L. ed. 975;

Fed. Radio Comm. v. Gen. Elec. Co., 281 U. S. 465, 74 L. ed. 969;

Fed. Radio Comm. v. Nelson, 289 U. S. 272, 274, 77 L. ed. 1166, 1172.

Wherefore, your petitioners respectfully pray that a Writ of Certiorari be issued out of and under the Seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and all proceedings in the cause numbered and entitled on its docket No. 11358, William P. Mitchell, Appellant, vs. Mrs. George C. Wright and Virgil M. Guthrie, Appellees, and that the said judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court,

and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioners will ever pray.

MRS. GEORGE C. WRIGHT and
VIRGIL M. GUTHRIE,
Petitioners,

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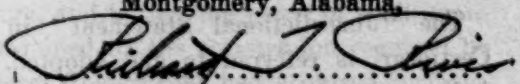

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BRIEF IN SUPPORT OF PETITION.

I.

THE OPINION OF THE COURTS BELOW.

The opinion of the District Court appears on pages 25-35, inclusive, of the Record and is reported as Mitchell v. Wright, 62 F. Supp. 580; the opinion of the Circuit Court of Appeals appears on pages 41-54, inclusive, of the Record and is reported as Mitchell v. Wright, 154 F. 2nd 924.

II.

JURISDICTION.

The "Jurisdictional Statement" in the petition for Certiorari is referred to and adopted. The date of the judgment to be reviewed is April 24, 1946 (R. 55). The petition for rehearing duly filed by the petitioners herein was denied on May 20, 1946 (R. 59). The statutory provisions under which jurisdiction is invoked is Judicial Code, Section 40, as amended (U. S. C., Title 28, Section 347).

III.

STATEMENT OF THE CASE.

A statement of the case has been given in the heading, "Summary and Short Statement of the Matter Involved," in the petition and, in the interest of brevity, the statement is not here repeated.

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in failing or refusing to decide important questions presented by the record and specifications of error, in briefs and on petition

for rehearing as to whether the plaintiff may maintain this action:

(a) As a class action.
(b) As an action for a declaratory judgment.
(c) As a suit for injunction.

2. The Circuit Court of Appeals erred in holding that the complaint shows that the plaintiff has been deprived of any right, privilege, or immunity secured by Article 1, Sections 2 or 4 or by the Seventeenth Amendment to the Constitution of the United States.

3. The Circuit Court of Appeals erred in holding in effect that by adopting for Congressional elections the qualifications of voters for the most numerous branch of the State Legislature, and by leaving proof of such qualifications to be determined by the registration required by the State, the Federal Government had acquired jurisdiction to supervise the right to vote in the State.

4. The Circuit Court of Appeals erred in holding that the complaint shows that the plaintiff has been deprived of any right, privilege or immunity secured by either the Fourteenth or Fifteenth Amendment to the Constitution of the United States.

5. The Circuit Court of Appeals erred in holding in effect that the alleged action of the Registrars *contrary to the State law and for the correction of which the State had provided an adequate remedy by appeal without cost to the plaintiff* is action of the State itself forbidden by either the Fourteenth or Fifteenth Amendment to the Constitution of the United States.

6. The Circuit Court of Appeals erred in holding that the remedy of the plaintiff by appeal under the laws of Alabama is judicial and not administrative, or that the plaintiff need not exhaust such administrative remedy before resorting to the Federal Court.

V.

ARGUMENT.

SPECIFICATION 1.

If this petition for certiorari is denied, the District Court will be left without guidance on the trial of the cause as to whether the plaintiff may maintain this action for the recovery of damages only, or also:

(a) As a class action.
(b) As an action for a declaratory judgment.
(c) As a suit for injunction.

The complaint contained separate prayers for such relief (R. 8). Those claimed remedies were discussed separately in the opinion of District Judge Kennamer, and a separate decision indicated on each (R. 28, 29 and 30). On petition for rehearing, the petitioners called attention that those claimed remedies had been the subject of separate specifications of error and had been argued separately in briefs, and the petitioners again requested the Circuit Court of Appeals to decide those questions (R. 56).

It is respectfully submitted that the petitioners are entitled to a decision of those questions and should not be remitted to the District Court for retrial with the necessary uncertainty and confusion as to whether the former decision of the District Court on those questions was in conformity with the decision of the Circuit Court of Appeals.

It is respectfully submitted that the failure or refusal of the Circuit Court of Appeals to decide those pertinent questions presented by the appeal is contrary to the doctrine early announced by this Court and never overruled that, "Where the law gives a party an appeal, he has a

right to demand the conscientious judgment of the Appellate Court on every question arising in the cause."

Post v. Jones, 60 U. S. (19 How.) 150, 161, 15 L. ed. 618, 622.

We respectfully submit that the opinion of the District Court gives cogent reasons why this action should not be maintained as a class action, for a declaratory judgment or for an injunction.

The statute (Title 28, U. S. C., Sec. 41, Subd. 14) allows a suit in equity only when that is the proper proceeding for redress, and such a suit is not available to supervise State electoral processes.

"The traditional limits of proceedings in equity have not embraced a remedy for political wrongs."

Giles v. Harris, 189 U. S. 475, 486, 47 L. ed. 909; Giles v. Teasley, 193 U. S. 146, 48 L. ed. 655.

The plaintiff had applied for and been denied registration. There was no averment that any of the other parties in whose behalf the plaintiff sued had made application to register, or had been denied registration. The District Court had no jurisdiction to register electors ab initio, or to pass upon their qualifications when those qualifications had not been submitted to a Board of Registrars provided by the State Legislature.

"Under the doctrine approved in Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 231, 53 L. ed. 150, 160, 29 Sup. Ct. Rep. 67, and Henderson Water Co. v. Corporation Commission, 269 U. S. 278, 70 L. ed. 273, 46 Sup. Ct. Rep. 112, the Interborough Company could not have resorted to a federal court without first applying to the commission as prescribed by the statute."

Gilchrist v. Interborough Rapid Transit Co., 279 U. S. 159, 208, 73 L. ed. 652, 664.

It is necessary, we submit, for the members of the class to want to register and to evidence that desire by making application, and for such application to be denied. Until then there would be no parties similarly situated to plaintiff, and hence no class on whose behalf the suit could be filed.

We shall not undertake to argue further the merits of these matters which the Circuit Court of Appeals failed and refused to decide, but respectfully request, in this connection, that that part of the opinion of the learned District Judge appearing on pages 28, 29 and 30 of the Record be re-read.

SPECIFICATIONS 2 AND 3.

In order to avoid the necessity of pleading and proving State action, the plaintiff attempted to plead that he had been deprived of the right, privilege or immunity secured by Article 1, Sections 2 and 4 of the Constitution and by the Seventeenth Amendment.

Title 8, Section 43 and subdivision 14 of Section 41, Tit. 28, United States Code, provide for actions or suits for deprivation of civil rights "under color of any statute, ordinance, regulation, custom, or usage of any state or territory."

The Fourteenth and Fifteenth Amendments to the Constitution of the United States protect only against action by the State, and when the deprivation claimed is of a right secured by those amendments, action by the State must be established.

Screws v. United States, 325 U. S. 91, 89 L. ed. 1495.

On the other hand, the right to vote in Congressional elections is provided by Article 1, Sections 2 and 4 of the Constitution, and by the Seventeenth Amendment.

"And since the Constitutional command is without restriction or limitation, the right, unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the actions of individuals as well as of States."

U. S. v. Classic, 313 U. S. 299, 315, 85 L. ed. 1368, 1377;
See also: Felix v. U. S. (5 C. C. A.), 186 Fed. 685, 108 C. C. A. 503;
U. S. v. Aezel, 219 Fed. 917, 931;
Ex p. Yarbrough, 110 U. S. 651, 28 L. ed. 274.

To think clearly upon the subject, we must have a clear understanding of just what constitutional right the plaintiff can claim under each provision of the Constitution.

"*The right of qualified voters* to cast their ballots and have them counted at Congressional elections" (Italics ours) is the right secured by the Constitution of the United States insofar as Congressional elections are concerned.

U. S. v. Classic, 313 U. S. 299, 315, 85 L. ed. 1368, 1376;
Ex p. Yarbrough, 110 U. S. 651, 28 L. ed. 274.

In the Classic case the charge was that the defendants wilfully altered and falsely counted and certified the ballots of votes cast in a primary election for members of Congress. There was no question of the qualification of the voters. Every case holding that the right to vote for a member of Congress is fundamentally based upon the Constitution of the United States has been a case where a *qualified* voter undertook to cast his ballot, or complained that his ballot had not been properly counted or certified. It has never been held that the right secured by the Constitution of the United States extends to the qualifications of the voters.

To be qualified under Article 1, Sections 2 and 4, or under the Seventeenth Amendment, "the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislatures." Hence the right to vote for members of Congress or of the Senate of the United States is dependent upon the possession of such qualifications by the elector.

Whether registration merely provides a means of furnishing proof of the required qualifications, or is itself one of the qualifications of an elector within the meaning of Article 1, Section 2, and Amendment 17 of the United States Constitution, whether direct legislation by Congress providing for the registration of voters in Congressional elections would be constitutional—these questions are not here presented.

See Commonwealth ex rel. Dimmit v. O'Connell, 298 Ky. 44, 181 S. W. (2d) 691, 696 (1944);
18 Am. Jurisprudence 232, Elections, Sec. 84.

Certainly in the absence of legislation by Congress, it cannot be debated that compliance with the state law as to registration is a prerequisite to the right to vote for members of Congress.

For one to insist on his right to vote for a member of Congress "he must not only have the requisite qualifications of an elector, but he must have been registered."

Wiley v. Sinkler, 179 U. S. 58, 66, 45 L. ed. 84, 89.

The appellant, until he has become registered as a qualified elector, is not in position to complain that he is deprived of the right of a qualified voter to vote in Congressional elections secured by the Constitution of the United States.

To hold otherwise would, we submit, result in unwarranted interference with the right of a State to ascertain

the qualifications of its own electors (subject, of course, to the requirement of the Fifteenth Amendment that the State not discriminate on account of race, color, or previous condition of servitude). If the civil action is here maintainable, and if the same act be done wilfully, then the Federal Government may intervene by criminal prosecution.

Screws v. United States, 325 U. S. 91, 89 L. ed. 1495.

Thus, under appellant's contention, the United States might control the *individual conduct* of State Registrars in passing on the qualifications of electors for State offices.

Registration as an elector is one of the qualifications to vote in "any election by the people," State, County or municipal.

Alabama Constitution 1901, Section 178.

Privilege to vote in a State is within the jurisdiction of the State so long as there is no discrimination.

Pope v. Williams, 193 U. S. 621, 632, 48 L. ed. 817, 822;
Breedlove v. Suttles, 302 U. S. 277, 82 L. ed. 252;
12 Am. Jur. 125.

Only indirectly (and possibly only in the absence of Congressional action on the subject) do the actions of the State Registrars ascertain the qualification of an elector to vote in a Congressional election.

> "The States in prescribing the qualifications of voters for the most numerous branch of their own Legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualification for voters for those eo nomine. They define who are to vote for the popular branch of their own Legislature, and the Constitution of the United States says the same persons shall vote for members

of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress."

Ex. p. Yarbrough, 110 U. S. 651, 28 L. ed. 274, 278;
Felix v. United States (1911, 5 C. C. A.), 186 Fed. 685, 689.

Article 1, Section 2, has been in the Constitution of the United States since its adoption, but has never been held to confer any right upon a Negro possessing the necessary qualifications to vote in Congressional elections. Until the adoption of the Fifteenth Amendment Negroes were openly discriminated against not only by Southern, but by Northern States. "Vermont, Massachusetts New Hampshire and New York alone before 1861 did not disfranchise them. • • • As late as 1868 most of the Northern States gave them no political privileges."

The Encyclopedia Americana, Vol. 27, page 467.

The Fifteenth Amendment conferred a new constitutional right.

The Fifteenth Amendment "has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. *That right is an exemption from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude.*" (Italics ours.)

United States v. Reese, 92 U. S. 218, 23 L. ed. 564;
Ex. p. Yarbrough, 110 U. S. 651, 28 L. ed. 274, 278;
See Lane v. Wilson, 307 U. S. 273-274, 83 L. ed. 1281, 1287.

It is by virtue of this new right invested by the Fifteenth Amendment and not by virtue of Article 1, Section 2, or of any other part of the original Constitution

that the plaintiff has a right to complain of discrimination in ascertaining his qualification to vote even in Congressional elections. That consideration shows the significance of the statement of Mr. Justice Frankfurter, speaking for the Court in the case of Lane v. Wilson, 207 U. S. 268, 274, 83 L. ed. 1281, 1287:

> "The basis of this action is inequality of treatment, though under color of law, not denial of the right to vote."

SPECIFICATIONS 4 AND 5.

The Fourteenth and Fifteenth Amendments protect only against action by the State. Can action of the Board of Registrars taken in defiance of the duties of the Board under Alabama law be deemed the action of the State? Upon that question, the cases seem to be divided.

See Barney v. N. Y., 193 U. S. 430, 48 L. ed. 737;
Raymond v. Chicago Union Traction Co., 207 U. S. 20, 41, 52 L. ed. 89;
Snowden v. Hughes, 321 U. S. 1, 13, 17, 88 L. ed. 497, 505, 507 (collecting cases);
Screws v. U. S., 325 U. S. 91, 89 L. ed. 1495.

No case, however, has gone so far as to hold that when the State law is fair and constitutional, and the State has provided a clear remedy effective for relief in the case before the Court and free from expense, for the enforcement of that law, that the action of subordinate officers contrary to the State law can be considered the action of the State itself until such remedy has been exhausted.

The federal statute and Constitution protect the individual in the exerice of his rights, privileges and immunities secured by the Constitution of the United States. The fact that the State may punish a person guilty of depriving an individual of such rights, privileges and immunities may provide redress for a public wrong, but not always for a

private wrong to the individual himself. The distinction was well pointed out by Mr. Justice Rutledge in his concurring opinion in Screws v. U. S., 325 U. S. 91, 117, 89 L. ed. 1495, 1511:

> "There could be no clearer violation of the Amendment or the statute. No act could be more final or complete, to denude the victim of rights secured by the Amendment's very terms. Those rights so destroyed, cannot be restored. Nor could the part played by the state's power in causing their destruction be lessened, though other organs were now to repudiate what was done. The state's law might thus be vindicated. If so, the vindication could only sustain, it could not detract from the federal power. Nor could it restore what the federal power shielded. Neither acquittal nor conviction, though affirmed by the State's highest court, could resurrect what the wrongful use of state power has annihilated. There was in this case abuse of state power, which for the Amendment's great purposes was state action, final in the last degree, depriving the victim of his liberty and his life without due process of law."

In the case now before the Court the plaintiff, being denied registration, may appeal to the State Circuit Court without cost, without giving security for costs to have his qualifications as an elector determined and final judgment in favor of the plaintiff entitles him or her to registration as of the date of his application to the Registrars.

Ala. Code 1940, Title 17, Sec. 35 (Copied in Appendix).

It is respectfully submitted that the action of the Registrars alleged in the complaint being contrary to the State law and for correction of which action the state has provided an adequate remedy by appeal without cost to the plaintiff is not action of the State itself forbidden by either the Fourteenth or Fifteenth Amendments to the Constitution of the United States.

SPECIFICATION 6.

The District Court properly declined to take jurisdiction because the *Plaintiff had not exhausted his administrative remedies under the State law.*

The opinion of the learned District Judge is so clear on this point, that we respectfully request that that part of the opinion appearing on pages 33, 34 and 35 of the Record be re-read.

In the case of Lane v. Wilson, 307 U. S. 268, 59 S. Ct. 872, 83 L. ed. 1281, Mr. Justice Frankfurter, speaking for the Court, said at page 274:

> **"Normally, the state legislative process, sometimes exercised through administrative powers conferred in state courts, must be completed before resort to the federal courts can be had."**

In that case, however, the Supreme Court held that the state procedure provided by the Oklahoma statute was a conventional judicial proceeding, and, of course, resort to a federal court may be had without exhausting the judicial remedies of state courts. On the other hand, in Trudeau v. Barnes (5th C. C. A.), 65 F. 2nd 563, 564, certiorari denied 290 U. S. 659, 78 L. ed. 571, it was held that the remedy afforded by the Louisiana Constitution was an administrative remedy which the plaintiff was bound to exhaust before going into the Federal Court to sue for damages.

From those decisions involving the registration of electors as well as from the uniform holdings of the Supreme Court, there can be no doubt that if the plaintiff's remedy by appeal provided by State law is an administrative remedy, then the plaintiff must exhaust that remedy before suing for damages in the Federal Court.

Prentis v. A. C. L. R. Co., 211 U. S. 210, 226, 53 L. ed. 150, 159;

Henderson Water Co. v. Corporation Commission, 269 U. S. 278, 70 L. ed. 273;
Keller v. Potomac Electric Power Co., 261 U. S. 428, 67 L. ed. 731;
Porter v. Investors' Syndicate, 286 U. S. 461, 76 L. ed. 1226;
Same case, 287 U. S. 346, 77 L. ed. 354;
Ex p. Virginia, 100 U. S. 339, 25 L. ed. 676, 680;
Pacific Telephone Co. v. Kuykendall, 265 U. S. 196, 68 L. ed. 975;
Fed. Radio Comm. v. Gen. Elec. Co., 281 U. S. 465, 74 L. ed. 969;
Fed. Radio Comm. v. Nelson, 289 U. S. 272, 274, 77 L. ed. 1166, 1172.

Plaintiff does not dispute that proposition of law, but contends that the remedy provided under Section 35 of Title 17 of the Alabama Code of 1940 is judicial rather than administrative, and that is the chief point of difference between us.

That statute is a *verbatim* copy from the sixth subdivision of Section 186 of the 1901 Constitution of Alabama having to do with the registration of electors until the first day of January, 1903, and which is copied in the Appendix. There could, therefore, hardly be any claim that the statute is unconstitutional and, as the District Judge noted (R. 34), the plaintiff made and makes no such claim.

The question is whether the remedy of appeal provided by the Alabama statute is administrative or judicial. *Whether an act is judicial or administrative is determined by its character and not by the character of the agent.*

Ex p. Virginia, 100 U. S. 339, 25 L. ed. 676, 680;
Prentis v. A. C. L. R. Co., 211 U. S. 226, 53 L. ed. 159;
Keller v. Potomac Electric Power Co., 261 U. S. 428, 67 L. ed. 731;

Porter v. Investors' Syndicate, 286 U. S. 461, 76 L. ed. 1226;
Same case, 287 U. S. 346, 77 L. ed. 354;
Pacific Telephone Co. v. Kuykendall, 265 U. S. 196, 68 L. ed. 975;
42 Amer. Jur. 564, Sec. 191, p. 588, Sec. 201;
Fed. Radio Comm. v. Gen. Elec. Co., 281 U. S. 465, 74 L. ed. 969;
Fed. Radio Comm. v. Nelson, 289 U. S. 272, 274, 77 L. ed. 1166, 1172.

It is respectfully but earnestly submitted that a reading of the opinions in the cases just cited will make clear the distinction between Lane v. Wilson, supra, and Trudeau v. Barnes, supra.

The Oklahoma statute considered in Lane v. Wilson provides that:

> "Wherever an elector is refused registration by any registration officer *such action may be reviewed* by the district court of the county by the aggrieved elector by his filing within ten days a petition with the Clerk of said Court, whereupon *summons shall be issued to said* registrar requiring him to answer within ten days, and the district court shall be a (give an) expeditious hearing and from his judgment an appeal will lie at the instance of *either party* to the Supreme Court of the State *as in civil cases.*" (Italics ours.)

The appeal, under the Oklahoma statute, is simply a "*review*" of the action of the registration officer; the aggrieved elector and the registrar are the two *parties* to the proceeding; the appeal to the Supreme Court lies "*as in civil cases.*" In Oklahoma neither the District Court nor the Supreme Court can grant any affirmative relief, or can go any further than to "review" the action of the registration officer.

Under the provision of the Constitution of Louisiana considered in Trudeau v. Barnes, a person denied registration "shall have the right to *apply for relief* to the district court"; the verdict there "shall be a *final determination* of the cause." (Italics ours.)

In Oklahoma, the district court *reviews* the action of the registrar, apparently either to affirm that action or to reverse or quash the action and send the application back to the registrar for further proceeding. In Louisiana, the district court grants *relief*, and the verdict there is a *final determination* of the cause. The *"review"* of the Oklahoma district court is clearly a judicial proceeding. The application for *"relief"* in the Louisiana district court is clearly an administrative proceeding. There is no conflict between *Lane v. Wilson, supra,* and *Trudeau v. Barnes, supra.* Both decisions are sound and a clear understanding of the distinction between them points unerringly to the proper decision of the case at bar.

In Alabama, a person denied registration may appeal to the Circuit Court *"without giving security for costs"*; the appeal is by petition *"to have his or her qualifications as an elector determined"*; the only charge to the jury is "as to *what constitute the qualifications that entitle the applicant to become an elector at the time he or she applied for registration"*; there is no review of the proceedings already had before the registrar, but the jury returns a verdict upon the single issue of whether the applicant possessed the qualifications that entitle him to become an elector at the time he applied for registration; "final judgment in favor of the petitioner shall *entitle him or her to registration* as of the date of his or her application to the registrars."

In Alabama the State has no right of appeal where the applicant is granted registration.

State v. Crenshaw, 138 Ala. 506, 35 So. 456.

That is true also under the Louisiana Constitution, but not under the Oklahoma statute which gives *"either party"* the right to appeal to the Supreme Court of that State.

We respectfully submit, under all of the foregoing authorities, the remedy provided by the Alabama Legislature is administrative, and the plaintiff must avail himself of that administrative remedy before coming into the Federal Court.

A number of cases have arisen where the Court did not do the manual or ministerial act required of the administrative body, but the Court's judgment was final as to the right to have that act done, and where the appeal to the Court has been held to be administrative. For example, in the case of Federal Radio Commission v. General Electric Co., 281 U. S. 464, 74 L. ed. 969, the judgment of the Court of Appeals of the District of Columbia is thus stated in the Supreme Court's opinion:

> "After a hearing that court found from the record returned by the Commission that public convenience, interest and necessity would be served by renewing the existing license without change in its terms, and on that basis held that such a renewal should be granted and that the proceedings should be remanded to the Commission with a direction to carry the court's decision into effect."

The United States Supreme Court held that it had no jurisdiction to review that decision, because it was a mere administrative decision.

In the case of Postum Cereal Co. v. California Fig Nut Co., 272 U. S. 693, 71 L. ed. 478, on an appeal from a decree of the Court of Appeals of the District of Columbia dismissing an appeal from a decision of the Commissioner of Patents refusing to cancel the registration of a trademark, the Supreme Court said:

> "The decision of the court of appeals under Section 9 of the Act of 1905 is not a judicial judgment. It is a mere administrative decision. It is merely an instruction to the Commissioner of Patents by a Court which is made part of the machinery of the Patent Office for administrative purposes."

In discussing the same procedure of appeal from the Commissioner of Patents, the Supreme Court in the case of Butterworth v. United States, 112 U. S. 50, 28 L. ed. 656, 659, said that such appeal "is not the exercise of ordinary jurisdiction at law or in equity on the part of that Court, but is one step in the statutory proceeding under the patent laws whereby that tribunal is interposed in aid of the Patent Office, though not subject to it," and further, that the Commissioner "is bound to record and obey it (the judgment). His failure or refusal to execute it by appropriate action would undoubtedly be corrected and supplied by suitable judicial process." The same statement would be applicable to the duties of the registrars to comply with the Court's judgment entitling an applicant to registration.

The concurring opinion of Circuit Judge Lee in this cause, we respectfully submit, ignores the contention that the remedy by appeal under the laws of Alabama is administrative or executive as distinguished from the legislative. The distinction is fundamental and has, of course, been recognized and enforced by this Court.

> U. S. v. George, 228 U. S. 14, 22, 57 L. ed. 712, 716;
> Mutual Films v. Industrial Commission of Ohio, 236 U. S. 230, 245, 59 L. ed. 552, 560.

It is to the paramount interest of the plaintiff and other Negro applicants for registration that the law encourage the selection of good and responsible registrars. If registrars are subject to immediate suit for damages on account of their determination of whether an applicant possesses

the requisite qualifications of an elector, then it will be difficult indeed to get the requisite high type of citizen to serve as a registrar. The Alabama system of registration has wisely provided further steps in the administrative process of registration, steps which are admittedly fair and which extend to the protection of the very class whom the plaintiff claims to represent.

Respectfully submitted,

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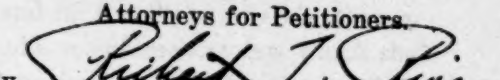
By 
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APPENDIX A.

Constitution of the United States—1787.

Article I.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of choosing Senators.

Amendment 14.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment 15.

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment 17.

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

United States Code.

Title 8. Section 31. Race, color, or previous condition not to affect right to vote.

All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding. R. S. Sec. 2004.

Section 43. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. R. S. Sec. 1979.

Title 28. Section 41. Subdivision 11. Suits for injuries on account of acts done under laws of United States.—Eleventh.

Of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him, under any law of the United States, for the protection or collection of any of the revenues thereof, or to enforce the right of citizens of the United States to vote in the several States. R. S. Sec. 629.

Subdivision 14. Suits to redress deprivation of civil rights.—Fourteenth.

Of all suits at law or equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States. R. S. Sec. 563.

APPENDIX B.

Constitution of Alabama—1901.

Article VIII.

Section 177. Qualifications of voters.

Every male citizen of this State, who is a citizen of the United States, and every male resident of foreign birth, who, before the ratification of this Constitution, shall have legally declared his intention to become a citizen of the United States, twenty-one years old or upward, not laboring under any disabilities named in this article, and possessing the qualifications required by it, shall be an elector, and shall be entitled to vote at any election by the people; provided, that all foreigners who have legally declared their intention of becoming citizens of the United States, shall, if they fail to become citizens thereof at the time they are entitled to become such, cease to have the right to vote until they become such citizens.

Section 178. Residence requirement—registration.

To entitle a person to vote at any election by the people, he shall have resided in the State at least two years, in the county one year, and in the precinct or ward three months, immediately preceding the election at which he offers to vote, and he shall have been duly registered as an elector, and shall have paid on or before the first day of February next preceding the date of the election at which he offers to vote, all poll taxes due from him for the year nineteen hundred and one, and for each subsequent year; provided, that any elector who, within three months next preceding the date of the election at which he offers to vote, has removed from one precinct or ward to another precinct or ward in the same county, incorporated town or city, shall

have the right to vote in the precinct or ward from which he has so removed, if he would have been entitled to vote in such precinct or ward but for such removal.

Section 181. Literacy and land ownership qualifications.

After the first day of January, nineteen hundred and three, the following persons, and no others who, if their place of residence shall remain unchanged, will have, at the date of the next general election the qualifications as to residence prescribed in Section 178 of this Constitution, shall be qualified to register as electors, provided, they shall not be disqualified under Section 182 of this Constitution.

First. Those who can read and write any article of the Constitution of the United States in the English language, and who are physically unable to work; and those who can read and write any article of the Constitution of the United States in the English language, and who have worked or been regularly engaged in some lawful employment, business or occupation, trade or calling for the greater part of the twelve months next preceding the time they offer to register; and those who are unable to read and write, if such inability is due solely to physical disability; or,

Second. The owner in good faith, in his own right, or the husband of a woman who is the owner in good faith, in her own right, of forty acres of land situate in this State, upon which they reside; or the owner in good faith, in his own right, or the husband of any woman who is the owner in good faith, in her own right, of real estate, situate, in this State assessed for taxation at the value of three hundred dollars or more, or the owner in good faith in his own right, or the husband of a woman who is the owner in good faith, in her own right, of personal property in this State assessed for taxation at three hundred dollars or more; provided that the taxes due upon such real or personal

property for the next preceding year in which he offers to register shall have been paid, unless the assessment shall have been legally contested and is undetermined.

Section 182. Disqualifications of voters.

The following persons shall be disqualified both from registering and from voting, namely:

All idiots and insane persons; those who shall by reason of conviction of crime be disqualified from voting at the time of the ratification of this Constitution; those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretences, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude; also any person who shall be convicted as a vagrant or tramp, or, of selling or offering to sell his vote or the vote of another, or of making or offering to make false return in any election by the people or in any primary election to procure the nomination or election of any person to any office, or of suborning any witness or registrar to secure the registration of any person as an elector.

Section 184. Qualifications for voting in local elections.

No person, not registered and qualified as an elector under the provisions of this article, shall vote at the general election in nineteen hundred and two, or at any subsequent State, county, or municipal election, general, local or special; but the provisions of this article shall not apply to any election held prior to the general election in the year nineteen hundred and two.

Section 186. Registration.

The Legislature shall provide by law for the registration, after the first day of January, nineteen hundred and three, of all qualified electors. Until the first day of January, nineteen hundred and three, all electors shall be registered under and in accordance with the requirements of this section as follows:

First. Board of Registrars—Registration shall be conducted in each county by a board of three reputable and suitable persons resident in the county, who shall not hold any elective office during their term, to be appointed within sixty days after the ratification of this constitution, by the Governor, Auditor and Commissioner of Agriculture and Industries, or by a majority of them, acting as a board of appointment. If one or more of the persons appointed on such board of registration shall refuse, neglect, or be unable to qualify or serve, or if a vacancy or vacancies occur in the membership of the board of registrars from any cause, the Governor, Auditor, and Commissioner of Agriculture and Industries, or a majority of them, acting as a board of appointment, shall make other appointments to fill such board. Each registrar shall receive two dollars per day, to be paid by the State, and disbursed by the several judges of probate, for each entire day's attendance upon the sessions of the board. Before entering upon the performance of the duties of his office, each registrar shall take the same oath required of the judicial officers of the State, which oath may be administered by any person authorized by law to administer oaths. The oath shall be in writing and subscribed by the registrar and filed in the office of the judge of probate of the county.

Second. First Registration—Prior to the first day of August, nineteen hundred and two, the board of registrars in each county shall visit each precinct at least once, and

oftener, if necessary to make a complete registration of all persons entitled to register, and shall remain there at least one day from eight o'clock in the morning until sunset. They shall give at least twenty days' notice of the time when, and the place in the precinct where, they will attend to register applicants for registration, by bills posted at five or more public places in each election precinct, and by advertisement once a week for three successive weeks in a newspaper, if there be one published in the county. Upon failure to give such notice, or to attend any appointment made by them in any precinct, they shall, after like notice, fill new appointments therein; but the time consumed by the board in completing such registration shall not exceed sixty working days in any county, except that in counties of more than nine hundred square miles in area, such board may consume seventy-five working days in completing the registration, and except that in counties in which there is any city of eight thousand or more inhabitants, the board may remain in session, in addition to the time hereinbefore prescribed, for not more than three successive weeks in each of such cities; and thereafter the board may sit from time to time in each of such cities not more than one week in each month, and except that in the county of Jefferson the board may hold an additional session of not exceeding five consecutive days duration for each session, in each town or city of more than one thousand and less than eight thousand inhabitants. No person shall be registered except at the county site or in the precinct in which he resides. The registrars shall issue to each person registered a certificate of registration.

Third. Supplementary Registration—The board of registrars shall not register any persons between the first day of August nineteen hundred and two and the Friday next preceding the day of election in November, nineteen hundred and two. On Friday and Saturday next preceding the day of election in November, nineteen hundred and two,

they shall sit in the court house of each county during such days, and shall register all applicants having the qualifications prescribed by Section 180 of this Constitution, and not disqualified under Section 182, who shall have reached the age of twenty-one years after the first day of August, nineteen hundred and two, or who shall prove to the reasonable satisfaction of the board that, by reason of physical disability or unavoidable absence from the county, they had no opportunity to register prior to the first day of August, nineteen hundred and two, and they shall not on such days register any other persons. When there are two or more court houses in a county, the registrars may sit during such two days at the court house they may select, but shall give ten days' notice, by bills posted at each of the court houses, designating the court house at which they will sit.

Fourth. Third Registration—The board of registrars shall hold sessions at the court house of their respective counties during the entire third week in November, nineteen hundred and two, and for six working days next prior to the twentieth day of December, nineteen hundred and two, during which session they shall register all persons applying who possess the qualifications prescribed in Section 180 of this Constitution, and who shall not be disqualified under Section 182. In counties where there are more than two court houses the board of registrars shall divide the time equally between them. The board of registrars shall give notice of the time and place of such sessions by posting notices at each court house in their respective counties, and at each voting place and at three other public places in the county, and by publication once a week for two consecutive weeks in a newspaper, if one is published in the county; such notices to be posted and such publications to be commenced as early as practicable in the first week in November, nineteen hundred and two. Failure on the part of the registrars to conform to the

provisions of this article as to the giving of the required notices shall not invalidate any registration made by them.

Fifth. Oath—The board of registrars shall have power to examine, under oath or affirmation, all applicants for registration, and to take testimony touching the qualifications of such applicants. Each member of such board is authorized to administer the oath to be taken by the applicants and witnesses, which shall be in the following form, and subscribed by the person making it, and preserved by the board, namely: "I solemnly swear (or affirm) that in the matter of the application of ..... for registration as an elector, I will speak the truth, the whole truth, and nothing but the truth, so help me God." Any person who upon such examination makes any wilfully false statement in reference to any material matter touching the qualification of any applicant for registration, shall be guilty of perjury, and upon conviction thereof, shall be imprisoned in the penitentiary for not less than one nor more than five years.

Sixth. Appeal—The action of the majority of the board of registrars shall be the action of the board and a majority of the board shall constitute a quorum for the transaction of all business. Any person to whom registration is denied shall have the right of appeal, without giving security for costs, within thirty days after such denial, by filing a petition in the Circuit Court or court of like jurisdiction held for the county in which he seeks to register, to have his qualifications as an elector determined. Upon the filing of the petition the clerk of the court shall give notice thereof to any solicitor authorized to represent the State in said county, whose duty it shall be to appear and defend against the petition on behalf of the State. Upon such trial the court shall charge the jury only as to what constitutes the qualifications that entitle the applicant to become an elector at the time he applied for regis-

tration, and the jury shall determine the weight and effect of the evidence and return a verdict. From the judgment rendered an appeal will lie to the Supreme Court in favor of the petitioner, to be taken within thirty days. Final judgment in favor of the petitioner shall entitle him to registration as of the date of his application to the registrars.

Seventh. Printing of Registrars—The Secretary of State shall, at the expense of the State, have prepared and shall furnish to the registrars and judges of probate of the several counties a sufficient number of registration books and of blank forms of the oath, certificates of registration and notices required to be given by the registrars. The cost of the publication in newspapers of the notices required to be given by the registrars shall be paid by the State, the bills therefor to be rendered to the Secretary of State and approved by him.

Eighth. Fraudulent Registration—Any person who registers for another, or who registers more than once, and any registrar who enters the name of any person on the list of registered voters, without such person having made application in person under oath on a form provided for that purpose, or who knowingly registers any person more than once, or who knowingly enters a name upon the registration list as the name of a voter, without any one of that name applying to register, shall be guilty of a felony, and upon conviction thereof shall be imprisoned in the penitentiary for not less than one nor more than five years.

APPENDIX C.

Code of Alabama, 1940.

Title 17.

Sec. 21. Registrars; Appointment of.—Registration shall be conducted in each county by a board of three reputable and suitable persons to be appointed by the governor, auditor and commissioner of agriculture and industries, or by a majority of them acting as a board of appointment, and who must also be electors and residents of the county and who shall not hold an elective office during their term. One of said members shall be designated by the board of appointment as chairman of the board of registrars for each county. Provided, however, that in counties of over 350,000 population, according to the last or any subsequent census, that the governor shall appoint the chairman of the board of registrars.

Sec. 24. Fees, Compensation of Registrars.—Each registrar shall receive five dollars per day, to be paid by the state and disbursed by the several judges of probate for each day's attendance upon the sessions of the board.

Sec. 25. Oath of Registrars.—Before entering upon the duties of this office, each registrar shall take the same oath as required of the judicial officers of the state, which oath may be administered by any person authorized to administer oaths. The oath shall be in writing and subscribed by the registrar, and filed in the office of the judge of probate of the county. Said registrars are judicial officers, and shall act judicially in all matters pertaining to the registration of applicants.

Sec. 32. Persons Qualified to Register.—The following persons, and no other, who, if their places of residence shall remain unchanged, will have at the date of the next general election the qualifications as to residence pre-

scribed by Section 178 of the Constitution of 1901, shall be qualified to register as electors, provided they shall not be disqualified under the laws of the state:

1st. Those who can read and write any article of the Constitution of the United States in the English language, and who have worked or been largely employed in some lawful employment, business or occupation, trade or calling for the greater part of twelve months next preceding the time they offer to register, and those who are unable to read and write, if such inability is due solely to physical disability; or,

2nd. The owner in good faith in his or her own right, or the husband of a woman or the wife of a man who is the owner in good faith in her or his own right of forty acres of land situated in this state, upon which they reside; or the owner in good faith in his or her own right, or the husband of any woman or the wife of any man who is the owner in good faith in his or her own right of real estate situated in this state, assessed for taxation at a value of three hundred dollars, or more; or the owner in good faith, in his or her own right, or the husband of any woman or the wife of any man who is the owner in good faith in her or his own right of personal property in this state, assessed for taxation for three hundred dollars or more; provided, that the taxes due upon such real or personal property for the next year preceding the year in which he or she offers to register shall have been paid, unless the assessment shall have been legally contested and is undetermined.

Sec. 35. Right of Appeal from Registration.—Any person to whom registration is denied shall have the right to appeal, without giving security for costs, within thirty days after such denial, by filing a petition in the Circuit Court or Court of like jurisdiction held for the county

in which he or she seeks to register, to have his or her qualifications as an elector determined. Upon the filing of the petition, the clerk of the Court shall give notice thereof to the solicitor authorized to represent the state in said county, who shall appear and defend against the petition on behalf of the state. Upon such trial the Court shall charge the jury as to what constitutes the qualifications that entitle the applicant to become an elector at the time he or she applied for registration, and the jury shall determine the weight and effect of the evidence and return a verdict. From the judgment rendered an appeal will lie to the Supreme Court in favor of the petitioner, to be taken within thirty days. Final judgment in favor of the petitioner shall entitle him or her to registration as of the date of his or her application to the registrars.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 399

MRS. GEORGE C. WRIGHT, *et al.*,
Petitioners,

v.

WILLIAM P. MITCHELL,
Respondent.

MEMORANDUM BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THURGOOD MARSHALL,
ARTHUR D. SHORES,
Counsel for Respondent.

ROBERT L. CARTER,
of Counsel.

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MEMORANDUM BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondent opposes the granting of a writ of certiorari in this case on the grounds that the decision of the Circuit Court of Appeals for the Fifth Circuit is correct, proper and consistent with prior decisions and precedents of this Court. Petitioners seek a review here of a judgment rendered upon the pleadings. The judgment of the Circuit Court of Appeals does not accomplish a final disposition of respondent's cause but merely decides that the amended complaint states a valid cause of action and provides grounds legally sufficient for a trial of the controversy to determine the actual merits of the case.

Statement of the Case

Respondent, as plaintiff in the District Court of the United States for the Middle District of Alabama, filed his complaint against the defendant Board of Registrars, petitioners herein, seeking five thousand ($5,000) dollars in damages, a permanent injunction against, and a judgment declaratory of, an alleged unconstitutional policy, custom and usage of the defendant Board of Registrars and their predecessors in office in subjecting Negroes to tests not required of whites, and in refusing to register qualified Negro electors, while at the same time registering white persons less qualified than Negro applicants, because of race or color.

Respondent, a colored person of African descent, duly meets all the requirements for registration and voting under the Constitution and laws of the United States and the State of Alabama.[1] He is a citizen of the United States and a bona fide resident of the State of Alabama. He is over 21 years of age. He is neither an idiot nor insane and has not been convicted of any felony or crime. He is a taxpayer of the State and paid taxes in full on real property with an evaluation in excess of three hundred ($300.00) dollars prior to the time he offered to register. In short, respondent possesses all the qualifications and none of the disqualifications for registering and voting under the laws of the United States and of the State of Alabama (R. 5).

On July 5, 1945, respondent made due application to petitioners, the official registrars of voters of Macon County, for registration in order to be eligible to vote in

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[1] The Constitution of the United States, Article I, Sections 2 and 4, the 17th Amendment, and the Constitution of Alabama, Article VIII, Sections 177, 178, 181, 182, 186; Alabama Code of 1940, Section 32, Title 17.

future federal as well as state elections. Respondent was refused registration solely on account of his race or color after being required to answer questions and to produce two persons to vouch for him, while white persons were being registered forthwith without being subjected to such tests, all pursuant to a general, habitual and systematic discriminatory practice of petitioners (R. 6).

Respondent did not bring this cause of action because of the sole act of the petitioners in refusing him registration but instituted suit to contest the constitutionality of a policy, custom and usage established by petitioners' predecessors in office and maintained by them to prevent Negroes from registering and voting in the county of Macon. The core of respondent's amended complaint may be found in Paragraphs 6, 9, 10 and 11 thereof, where it is alleged:

"6.

Plaintiff, William P. Mitchell, is colored, a person of African descent and Negro blood, is over the age of twenty-one years. He is a taxpayer of the State of Alabama, and pays tax on real property with an assessed valuation in excess of Three Hundred Dollars. Plaintiff alleges that he is able to read and write any passage of the United States Constitution, that he has never been adjudged guilty of felony or any crime and that he is not an idiot or insane. Plaintiff further alleges that by reason of the allegation herein above made, he was in all particulars on the 5th day of July, 1945, and still is possessed of the qualifications of an elector and as such was and is entitled to be registered as such elector."

"9.

That defendants have established and are maintaining a policy custom and usage of denying to plaintiff and others on whose behalf this suit is

brought the equal protection of the laws by requiring them to submit to tests not required of white electors applying for registration and have continued the policy of refusing to register qualified Negro electors while at the same time registering white electors with less qualifications than those of Negro applicants solely because of race or color."

"10.

That on or about the 5th day of July, 1945, during the regular registration period while defendants, Mrs. George C. Wright and Virgil M. Guthrie, were acting as registrars of voters under the laws of Alabama in conducting the registration of persons qualified to register, plaintiff made application at the Macon County Court House, the place for registration of persons qualified to register, he filled out the regular form for registration, he produced two persons to vouch for him, as required by the board, he correctly answered such questions as were asked in proof of his qualifications, and was ready, willing and able to give any further information and evidence necessary to entitle him to be registered; that by reason of the said fact hereinbefore made, plaintiff was entitled to be registered as a voter. Plaintiff applied for registration in order to be eligible to vote in future federal as well as state elections."

"11.

Plaintiff further shows that during such registration period and on or about the 5th day of July, 1945, white persons presenting themselves for registration were not required to present persons to vouch for them, but were registered forthwith, whereas your petitioner solely because of his race and color was required to wait long hours before being permitted to file his application, was required to present persons to vouch for him, after which the said defendants denied plaintiff application and

wrongfully refused and illegally failed to register plaintiff on said July 5, 1945, solely on account of his race, color and previous condition of servitude. Plaintiff further states that it has become the general habitual and systematic practice of said Board of Registrars, including these defendants, Mrs. George C. Wright and Virgil M. Guthrie, and their predecessors in office to refuse to register Negro residents of Macon County, including the plaintiff, William P. Mitchell."

The cause was heard in the District Court upon a motion to dismiss the amended complaint on the ground that said complaint failed to state a cause of action. Upon the hearing of said motion, the District Court sustained petitioners' motion to dismiss and issued an order dismissing the complaint. From that order respondent appealed. The Circuit Court of Appeals for the Fifth Circuit reversed the judgment of the District Court and remanded the cause.

Questions Presented

I. Where a Registrar or Board of Registrars of Voters, Pursuant to a Policy, Custom and Usage, Subjects Respondent and All Other Qualified Negro Applicants to Tests Not Required of White Applicants Who Apply for Registration in Order to Qualify to Vote in Forthcoming Federal and State Elections Can Relief Be Sought in the Federal Courts in the Form of a Class Action Seeking Declaratory Judgment and Injunction Restraining Such Registrar or Board of Registrars from Subjecting Negroes to Tests Not Required of White Applicants, Without First Exhausting Remedies Under State Law?

II. Does the Action of a Registrar or Board of Registrars of Voters, in Refusing to Register Respondent and Other Qualified Negro Applicants on Account of Race and Color, Amount to a Deprivation of the Rights Secured Under the Laws and Constitution of the United States, Namely Article I, Section 2, 14th, 15th and 17th Amendments to the Constitution, Subdivisions 11 and 14 of Section 41 of Title 28, Sections 31 and 43 of Title 8 of the United States Code.

Summary of Argument

I

The Decision of the Circuit Court of Appeals That Failure to Pursue or Exhaust the Remedy Provided Under State Law in the Nature of a Conventional Judicial Proceeding Does Not Oust the Federal Courts of Jurisdiction Is Consistent with Precedents of This Court.

II

The Characterization of the Remedy Afforded Under Title 17, Section 35, Alabama Code of 1940, by the Circuit Court of Appeals as a Judicial Remedy Is Clearly Right.

ARGUMENT

I

The Decision of the Circuit Court of Appeals That Failure to Pursue or Exhaust the Remedy Provided Under State Law in the Nature of a Conventional Judicial Proceeding Does Not Oust the Federal Courts of Jurisdiction Is Consistent with Precedents of This Court.

This Court has been careful to make a distinction between judicial and administrative remedies in determining whether the remedies in question need be exhausted before application can be made to federal courts for relief. When the remedy is administrative or legislative, the rule of this Court is that the state remedy must be pursued and completed before the aggrieved party can have any standing in the federal courts. *Natural Gas Pipeline Co.* v. *Slattery;*[2] *Porter* v. *Investors Syndicate;*[3] *Railroad & Warehouse Commission Co.* v. *Duluth Street R. Co.;*[4] *Henderson Water Company* v. *Corporation Commission;*[5] *Pacific Telephone & Telegraph Company* v. *Kuykendall;*[6] *Prentiss* v. *Atlantic Coastline Company;*[7] *United States* v. *Sing Tuck.*[8]

On the other hand, remedies provided under state law that are judicial in nature need not be invoked or pursued before an action can be maintained in the federal courts.

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[2] 302 U. S. 300.
[3] 286 U. S. 461; aff'd on rehearing, 287 U. S. 346.
[4] 273 U. S. 625.
[5] 269 U. S. 279.
[6] 265 U. S. 196.
[7] 211 U. S. 210.
[8] 194 U. S. 161.

State Corporation Commission v. *Wichita;*[9] *Porter* v. *Investors Syndicate, supra; Bacon* v. *Rutland R. Co.;*[10] *Lane* v. *Wilson;*[11] *Pacific Telephone & Telegraph Company* v. *Kuykendall, supra.*

Whenever the question has been presented, this Court has carefully examined the remedy provided to determine whether it was legislative or judicial in nature. *Prentiss* v. *Atlantic Coastline Co., supra; Lane* v. *Wilson, supra; Pacific Telephone & Telegraph Company* v. *Kuykendall, supra; Porter* v. *Investors Syndicate, supra.*

The Circuit Court of Appeals in applying the rule that judicial remedies need not be exhausted before application can be made to the federal courts was following a well-established rule of law consistently adhered to in the decisions of this Tribunal. There is, therefore, no basis or reason for this Court to review or examine the decision of the court below.

II

The Characterization of the Remedy Afforded Under Title 17, Section 35, Alabama Code of 1940, by the Circuit Court of Appeals as a Judicial Remedy Is Clearly Right.

Under Section 35, Title 17 of the Alabama Code of 1940, a right of appeal is provided when registration is denied. The pertinent provisions of the statute are set out below:

> "Any person to whom registration is denied shall have the right to appeal, without giving security for

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[9] 290 U. S. 561.
[10] 232 U. S. 134.
[11] 307 U. S. 268.

> costs, within thirty days after such denial, by filing a petition in the circuit Court or Court of like jurisdiction held for the county in which he or she seeks to register, to have his or her qualifications as an elector determined. Upon the filing of the petition, the clerk of the Court shall give notice thereof to the solicitor authorized to represent the state in said county, who shall appeal and defend against the petition on behalf of the state. Upon such trial the Court shall charge the jury only as to what constitutes the qualifications that entitle the applicant to become an elector at the time he or she applied for registration, and the jury shall determine the weight and effect of the evidence, and return a verdict. From the judgment rendered an appeal will lie to the supreme Court in favor of the petition to be taken within thirty days. Final judgment in favor of the petitioner shall entitle him or her to registration as of the date of his or her application to the registrars."

The remedy therein provided is the type traditionally considered judicial. The aggrieved parties may go into a circuit court or court of like jurisdiction in the county in which he seeks to have his registration determined. Trial by jury is provided, and the court is required to charge the jury as to what constitutes the qualifications necessary for an applicant to become an elector at the time of his application for registration. The jury is required to determine the weight and effect of the evidence and return a verdict. From an adverse decision the aggrieved party may take an appeal to the Supreme Court of the State of Alabama.

Under this statute, the court has no initiatory functions. The proceedings must be commenced by the aggrieved person who contests the decision of the Board of Registrars. Normally administrative agencies are not so circumscribed but have the authority to commence a hearing on their own application, to call parties before them and

to make a determination of the issues involved. *Prentiss* v. *Atlantic Coastline Co., supra.* A court merely has the authority to declare and enforce liabilities, rights and duties as they exist on present or past facts and under a rule of law already operative. Legislative functions, on the contrary, have an element of futurity and generality which is not characteristic of judicial inquiries. *Prentiss* v. *Atlantic Coastline Company, supra.*

The remedy provided herein is similar in nature to that provided under the Oklahoma statute in the case of *Lane* v. *Wilson, supra,* which this Court characterized as judicial.[12] The Circuit Court of Appeals has gone thoroughly into this phase of the proceedings. A substantial portion of the majority opinion and the entire concurring opinion are devoted to a careful analysis of the state remedy provided and to a determination of its classification as administrative or judicial. In deciding that it was a judicial remedy, the Circuit Court of Appeals was merely following the rules and the yardstick which this Court has consistently used in making such determination in previous decisions.

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[12] The Oklahoma Statute (26 Okla. Stat. Sec. 74) provided in part: "and provided further, that wherever any elector is refused registration by any registration officer such action may be reviewed by the district court of the county by the aggrieved elector by his filing within ten days a petition with the Clerk of said Court, whereupon summons shall be issued to said registrar requiring him to answer within ten days, and the district court shall be a (give an) expeditious hearing and from his judgment an appeal will lie at the instance of either party to the Supreme Court of the State as in civil cases. * * *"

Conclusion.

The decision of the Circuit Court of Appeals is neither ambiguous nor confused. It in essence holds that the complaint states a cause of action and that federal courts have jurisdiction to grant the relief applied for upon proof that such relief is warranted according to the facts and evidence adduced in a trial on the merits. Under these circumstances, the public interest and the interest of the litigators will be best served by refusing to grant the writ of certiorari as prayed for by petitioners and by allowing a complete adjudication of all the issues involved in this litigation in a trial on the merits as ordered by the Circuit Court of Appeals.

WHEREFORE, for the reasons hereinabove advanced, the petition for writ of certiorari should be denied.

Respectfully submitted,

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